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## SRI ALAM SDN BHD

**v.**

## TETUAN RADZUAN IBRAHIM & CO

B

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S3-22-1080-2001]
17 JUNE 2009

C ***LEGAL PROFESSION:*** *Duty of care - Negligence - Advocates - Representation in an originating summons - Breach of duty of care in contract and in tort - Immunity of advocates from suits - Whether ought to be retained - Whether breach of duty proven*

D ***CONTRACT:*** *Breach - Negligence - Advocates' duty of care - Representation in an originating summons - Immunity of advocates from suits - Whether ought to be retained - Whether breach of duty proven*

***TORT:*** *Negligence - Breach of duty - Advocates' duty of care - Representation in an originating summons - Immunity of advocates from*
E *suits - Whether ought to be retained - Whether breach of duty proven*

The plaintiff, a private limited company dealing in housing development, appointed the defendant, a legal firm, to represent them in an originating summons ('OS') filed by Tetuan Wan Majid,
F Mano & Nada ('WMN') against the plaintiff in relation to outstanding legal fees owing to WMN for legal work undertaken in another suit. The plaintiff alleged that the defendant was in breach of their duty of care both in contract and in tort in that they were negligent in so representing the plaintiff in the conduct
G of the OS. The crux of the plaintiff's complaint of negligence was twofold. Firstly, the plaintiff asserted that the defendant should have first enquired if WMN were objecting to the filing of the affidavit-in-reply and if they were, the defendant should have filed an application for extension of time having regard to the
H amendments to O. 28 r. 3(4) of the Rules of the High Court 1980. Secondly, the plaintiff contended that it was not explained to them the full effects of not appealing against the decision of the judge and proceeding with the OS on the basis that WMN's assertions were not rebutted because there was no affidavit-in-
I reply. The defendant, however, argued that even if they were found to be negligent, they could not be sued. It was further

averred that since the complaint of breach of duty arose from the conduct and management of a case in court, they were immune from any suit.

**Held (dismissing the plaintiff's claim):**

**(1)** There were no compelling reasons for retaining the immunity of advocates. It is no longer in the public interest that the immunity should remain. The reality is that in the world today, expectations are high and criticisms come easily when things go wrong. There is no reason why advocates in Malaysia should be treated any differently from those in England. Accordingly, an advocate has no immunity from suits, and his or her position is the same with all professionals in the country. The defendant's contention in this regard must, therefore, fail. *Arthur JS Hall & Co v. Simons* (foll). (para 14)

**(2)** In respect of the first complaint, on the facts of this case, there was no breach of duty on the part of the defendant. The lead counsel, SD1, had quite appropriately and justifiably raised fairly persuasive arguments which any reasonable practitioner in his position would have done. It was unfortunate for him and the plaintiff in this case that the judge did not find in their favour. It was a matter which could have gone either way, as it sometimes happens in a court of law. It was a judgment call. It must be noted that positions taken by judges may be revised on appeal, and even positions long considered to be correct and accepted may not be followed with the passing of time. Hence, it was clear that there was no negligence on the defendant's part. (para 19)

**(3)** The second complaint of negligence by the plaintiff, upon a careful perusal of the evidence, was quite a long way from the truth. After the judge had delivered his decision excluding the affidavit-in-reply, an opinion dated 10 November 2000 by SD1 was provided to the plaintiff giving a detailed account of what transpired during the court proceedings and also the alternatives available, which were to either proceed without the affidavit or to appeal. Furthermore, a meeting was also held on 21 November 2000 between the plaintiff's representatives and SD1 (with two other persons) to again explain the alternative courses of action. At this meeting, a decision was taken to proceed with the OS since an appeal would only delay the hearing of the OS. (paras 21 & 22)

**(4)** Considering these circumstances, the defendant could not be faulted in any way. In the result, the plaintiff had failed to prove there was any breach of duty either under contract or tort by the defendant. (para 23)

**Case(s) referred to:**
*Arthur JS Hall & Co v. Simons [2000] 3 WLR 543* ***(foll)***
*Midland Bank v. Hett, Stubbs & Kemp [1979] Ch 384* ***(refd)***
*Miranda v. Khoo Yew Boon [1967] 1 LNS 102* ***(refd)***
*Mohd Nor Dagang Sdn Bhd v. Tetuan Mohd Yusof Endut & Associates [2001] 2 CLJ 364 HC* ***(refd)***
*Rondel v. Worsley [1969] 1 AC 191* ***(refd)***
*Saif Ali & Anor v. Sydney Mitchell & Co (A Firm) & Ors [1980] AC 198* ***(refd)***

**Legislation referred to:**
Legal Profession Act 1976, s. 123
Rules of the High Court 1980, O. 28 r. 3(4)

*For the plaintiff - Ahmad Kamal Abu Bakar (Mohd Safuan Fathy with him); M/s Khalek Awang & Assoc*
*For the defendant - Tunku Farik Ismail (Tan Siok Keng with him); M/s Azim, Tunku Farik & Wong*

*Reported by Suresh Nathan*

## JUDGMENT

**Harmindar Singh Dhaliwal JC:**

**[1]** The plaintiff is a private limited company dealing in housing development. The defendant was a legal firm. On 31 July 2000, the plaintiff appointed the defendant to represent them in the Kuala Lumpur Originating Summons Suit No. S5-24-1738-2000 ("the OS"). The plaintiff is alleging that the defendant was in breach of their duty of care both in contract and in tort in that they were negligent in so representing the plaintiff in the conduct of the OS. The defendant is denying the same.

**[2]** The facts were these. The OS was filed by Tetuan Wan Majid, Mano & Nada ("WMN") against the plaintiff in relation to outstanding legal fees amounting to RM7,250,000 owing to WMN for legal work undertaken in relation to Kuala Lumpur Suit No. C30-1985. In the OS, WMN were applying for a charging order under s. 123 of the Legal Profession Act 1976 to secure their

unpaid fees. The OS was served on the plaintiff on 22 July 2000. The plaintiff then appointed the defendant on 31 July 2000. Upon the advice of the defendant, the plaintiff also appointed two counsel, namely one Mr. N. Chandran (SD1) and Mr. Sri Dev Nair (SD2).

**[3]** The OS was fixed for hearing on 3 August 2000 but was subsequently adjourned to 24 October 2000 as the plaintiff needed time to file the affidavit in reply. In the meantime, there was an amendment to O. 28 of the Rules of High Court ("RHC") of which O. 28 r. 3(4) now stipulated that any affidavit in response to an originating summons must be served on the plaintiff not later then 14 days after being served with the affidavit in support of the originating summons. This amendment came into force on 21 September 2000.

**[4]** Although an affidavit in reply was filed by the defendant on 16 October 2000 and a reply to that filed by the WMN on 30 October 2000, a preliminary objection was taken on the ground that the affidavit filed by the defendant was out of time. This objection was upheld by the learned judge on 9 November 2000 and the hearing of the OS was adjourned to 2 June 2001. There was some discussion as to whether an appeal should be filed but in the end a decision was taken not to do so. At the hearing of the OS on 2 June 2001, the learned judge granted order in terms of prayer 1 and 3 of the OS. Despite reminders being sent, there was no response by the plaintiff as to whether to appeal or not. In the end, no appeal was filed. As the dates are important to understand the issues in this case, it may be useful to set out a chronology of events as follows:

**Chronology Of Events**

| Date | Event |
|---|---|
| January 1985 to 1996 | Messrs Wan Majid Mano & Nada ("WMN") appointed to defend the Plaintiff in the Kuala Lumpur High Court Suit No. C30-1985 against a company known as Newacres Sdn Bhd. |
| 16.07.1996 | WMN in defending the Plaintiff had succeeded in the Court of Appeal No. W-02-660-1995 where the Court granted an order declaring the Plaintiff's entitlement to 46 pieces of land under a joint venture agreement with Newacres Sdn Bhd |

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| 10.01.1997 | Bill No. 2570/97 in the amount of RM11,000,000 was sent by WMN to the Plaintiff for work done in respect of the Kuala Lumpur High Court Suit No. C30-1985. |
| 22.07.2000 | WMN served an Originating Summons on the Plaintiff in the Kuala Lumpur High Court Originating Summons Suit No: S5-24-1738-2000 (the "OS") for the outstanding legal fees owed by the Plaintiff to WMN. |
| 31.07.2000 | Defendant was appointed by the Plaintiff to defend them in the said OS. |
| 1.8.2000 | Memorandum of Appearance file |
| 03.08.2000 | Hearing of the said suit before the learned Judge. Defendant given leave to file affidavit in reply to the affidavit in support before the next hearing dated fixed on 24.10.2000. |
| 03.08.2000 | Learned Judge had also granted an interim injunction order against the Plaintiff on the charge order until the disposal of the said OS. |
| 21.09.2000 | Government Gazette P.U.(A) 342 amending Order 28 Rules of the High Court 1980 came into force. |
| 16.10.2000 | Defendant duly filed the affidavit in reply (the "said affidavit"). |
| 24.10.2000 | On the request of counsel for WMN, the hearing was adjourned to 09.11.2000 to enable WMN to file a further affidavit in reply. |
| 30.10.2000 | WMN filed their affidavit in reply. |
| 09.11.2000 | Counsel for WMN raised a preliminary objection with regard to the said affidavit alleging that in view of Order 28 Rule 3 RHC of which came into effect on 21.09.2000, the said affidavit was filed out of time and should be excluded. |
| | SD1 and SD2, counsel for the Defendant, advanced submissions in reply and submitted that Order 28 Rule 3 RHC did not have retrospective effect and as such, the said affidavit should not be excluded. |

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| 09.11.2000 | The Origination Summons was amended upon request by counsel for WMN. | A |
| 09.11.2000 | Learned Judge upheld the preliminary objection and adjourned the said OS for hearing to 02.06.2001. | |
| 10.11.2000 | SD1 in a letter advised the Plaintiff on the alternatives available as a result of the learned Judge's decision in the said OS. | B |
| 21.11.2000 | A meeting was held at SD1's office with the attendance of SP1, SP2, SD1, SD2 and SD3. It was decided that the Plaintiff was to proceed with the hearing of the OS without the benefit of the said affidavit, premised purely on legal arguments. | C |
| 02.06.2001 | Hearing of the OS. | D |
| 22.06.2001 | Learned Judge gave order in terms of prayer 1 and 3 of the OS. | |
| 25.06.2001 | Plaintiff was informed of the outcome of the decision delivered on 22.06.2001 and advised to lodge an appeal within one month from 22.06.2001. | E |
| 15.7.2001 | A reminder was sent to the Plaintiff to appeal before 21.7.2001. | F |
| 26.10.2001 | Plaintiff commenced this suit. | |

**[5]** The crux of the plaintiff's complaint of negligence is twofold. Firstly, the claim is that the defendant failed to file the affidavit in reply on time or, in any event, there was a failure to apply for extension of time to file the said affidavit. The plaintiff submits that this arose because of the failure of the defendant to keep abreast of the developments in the law, that is, the amendments to O. 28 RHC. The plaintiff claims that had it not been for the negligence of the defendant, the "outcome of the case could have been very much different". Secondly, the plaintiff contends that it was not explained to them the full effects of not appealing against the decision of the learned judge and proceeding with the OS on the basis that the assertions of WMN were not rebutted because there was no affidavit in reply. I will return to these contentions later.

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**[6]** An important issue was raised by the defendant which I think should be dealt with at the outset. The defendant argued that even if they were found to be negligent, they could not be sued. It was further argued that since the complaint of breach of duty arose from the conduct and management of a case in court, they were immune from any suit. They relied on the High Court decision in *Mohd Nor Dagang Sdn Bhd v. Tetuan Mohd Yusof Endut & Associates* [2001] 2 CLJ 364. It was held there that the limited immunity against liability should be extended to an advocate and solicitor in this country in his work which is intimately connected with the conduct of the litigation in court (at p 378). The court there was essentially relying on two House of Lords decisions in England in *Rondel v. Worsley* [1969] 1 AC 191 and *Saif Ali & Anor v. Sydney Mitchell & Co (A Firm) & Ors* [1980] AC 198 after also having considered the Federal Court decision in *Miranda v. Khoo Yew Boon* [1967] 1 LNS 102.

**[7]** The Federal Court in *Miranda* was asked to consider whether an advocate be he a barrister or solicitor who appeared in court for his client should, on the ground of public policy, be protected from suits brought by disgruntled clients. The Federal Court took the view that the position of advocate and solicitor is exactly the same as that of solicitor in England and if there is an act of negligence it is immaterial to consider whether the act is one normally done in England by a barrister or solicitor.

**[8]** The High Court in *Mohd Nor Dagang* considered that the Federal Court in *Miranda* did not address the aspect of immunity on the ground of public policy. It is noteworthy that the Federal Court did not have the benefit of the House of Lords decision in *Rondel* as the judgment appears to only refer to the Court of Appeal decision. Significantly, the House of Lords in *Rondel* narrowed the limits of immunity for barristers but widened the scope of protection for solicitors for acts concerned in the conduct of litigation as advocates The High Court held that immunity was necessary on public policy grounds on factors alluded to in *Rondel*'s case which were summarized as follows:

i) the consideration that a proper administration of justice may not be achieved if barristers are inhibited by the fear of being sued for negligence by a disgruntled client at the expense of exercising the duty he owes to the court;

ii) the public interest consideration in that issues already decided at a trial may have to be relitigated at the ensuing negligence suit between the client and his barrister to establish the negligence and damage flowing; and

iii) the existing general immunity attached to all other participants in proceedings before the court *viz* judges, court officials, witnesses or parties based on public policy to ensure that trials are conducted without the stress and fear on the part of those participants, not for their benefit but in the higher interest of the advancement of justice.

**[9]** However, the law in England with regards to immunity of advocates came up for re-examination in *Arthur J.S. Hall & Co v. Simons* [2000] 3 WLR 543. In that case, the House of Lords were unanimous in rejecting immunity in civil cases, and by a majority of four to three, decided that these policy considerations were no longer persuasive also in criminal proceedings. In a carefully reasoned judgment, the House of Lords found that none of the factors said to justify the immunity had sufficient weight to justify its retention. It was held therefore that advocates were in principle liable for negligence in the same way as other professionals.

**[10]** In the light of this development, the question that arises is whether advocates in Malaysia involved in the conduct of litigation in court should continue to be accorded immunity from being sued for negligence? I do not propose to go into detail the reasons as to why the House of Lords in *Hall*'s case were no longer persuaded by the public policy considerations for retaining the immunity. These reasons are well set out in the judgments. On the issue of relitigation, Lord Steyn was of the view that the principles of *res judicata*, issue estoppel and abuse of process of the court were adequate to cope with the risks of collateral challenges to decisions already made by the courts. In the case of immunities already conferred to all the other participants in court, it was felt that the public policy giving rise to such immunities had little to do with the alleged legal policy requiring immunity from actions for negligent acts (at p 551). For witnesses, immunity was necessary so that they would be more willing to come forward to tell the truth (at p 562). It was asserted that unlike the other participants, only the advocate owed a duty to his client (at p 570). On the question of whether the immunity was needed to ensure that the

advocates will respect their duty to the court, their Lordships found it unthinkable that anyone could be found to be negligent for acting in accordance with one's duty to the court (at p 564). Suffice to say, I had no difficulty in agreeing with the views and sentiments expressed and do not see why the same reasoning would not apply to advocates in Malaysia.

**[11]** Quite apart from this, I also consider the granting of immunity to be a serious matter. It deprives victims of a wrong from obtaining a remedy. Public confidence in the legal system may be affected if people who have suffered from negligent advocates are denied redress. It also begs the question as to why among professionals, only advocates are singled out for immunity from liability for negligence. Even solicitors doing non-litigation work are not protected. One may quite appropriately ask why surgeons, who during surgery may also have to make urgent decisions with far more serious consequences, are denied such immunity. It may further invite criticism that judges, who are all lawyers by training and perceived to be part of the legal fraternity, are protecting their own.

**[12]** I have also asked myself if the absence of immunity would cause difficulties to the advocates in Malaysia? Would it open the floodgates to suits against advocates for mishandling the litigation in court? I fail to see why that should be the case. I think far from causing difficulties, the standards at the Bar would improve. There are of course members of the Bar who have some difficulty in reconciling their duty to the court with that to their client. However, I think advocates do understand and appreciate that to move ahead and be successful, they need to establish credibility and reputation among their peers, the community and not least the judiciary. If the advocate is faithful to his duties to the court by being honest and diligent, it would not be so easy to find him or her negligent.

**[13]** In any event, it is also fair to say that proving negligence against advocates in the conduct of a case in court is already a difficult task. The onus to prove negligence is on the person alleging negligence. Mistakes or errors of judgment are made frequently by all professionals. Not all such mistakes or errors will lead to actionable negligence. There is an abundance of literature on this issue and I need only refer to *Saif Ali v. Sydney Mitchell & Co, supra*, where Lord Wilberforce put the issue in the following terms:

> Much if not most of a barrister's work involves exercise of judgment – it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of judgment, which is not infallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed.

**[14]** For these reasons, I find no compelling reasons or justification for retaining the immunity. It is no longer in the public interest that the immunity should remain. We have to accept the reality that we now live in a world where expectations are high and criticisms come easily when things go wrong. I see no reason why advocates in Malaysia should be treated any differently from those in England. I would accordingly declare that an advocate has no immunity from suits and that his or her position is the same with all professionals in the country. The contention of the defendant in this regard must therefore fail.

**[15]** I now return to the allegations of negligence asserted by the plaintiff. In relation to the first complaint, the plaintiff is asserting that the defendant should have first enquired if WMN were objecting to the filing of the affidavit in reply and if they were, the defendant should have filed an application for extension of time having regard to the amendments to O. 28 r. 3(4) RHC.

**[16]** In this regard, SD1 who was the lead counsel, testified that he was aware of the amendments to O. 28 RHC but took the position that the question of applying for an extension of time did not arise. The reason for this stance can be gathered from the submissions that were advanced by SD1 in opposing the preliminary objection by WMN. His arguments were that:

i) since the judge had allowed the amendment to the OS on the day itself on the basis there was an error, time, if at all ran from the date of the amendment;

ii) in any event, since the judge allowed the adjournment on 3 August 2000 to file an affidavit in reply without imposing any time period, they were entitled to do so any time until the next hearing date on 24 October 2000 and they did so more than four clear days before in accordance with the pre-amendment O. 28 RHC; and

iii) the amendment to O. 28 RHC was not retrospective in nature.

**[17]** Was counsel negligent in taking this position rather than the one suggested by the plaintiff now? In this regard, it is now accepted that advocates and solicitors owe concurrent duties in contract and its tort (*Midland Bank v. Hett, Stubbs & Kemp* [1979] Ch 384; *Saif Ali v. Sydney Mitchell, supra*). Their duty is to exercise reasonable degree of care and skill as with all professions. He or she is to be judged by what reasonably competent practitioners would do although a lawyer is to be judged according to the standards of practitioners of his own standing and seniority.

**[18]** In court proceedings we often see advocates, who have exercised reasonable care and competence, taking diametrically opposite views. It will then become the function of the judges to decide which view is the correct one. The view that is not accepted may be considered to be wrong. The fact that one view turns out to be wrong does not mean that the advocate has been negligent. In the same vein, it is also not unusual to find that judges who had held to a particular view be later found to be incorrect when the matter is taken up and decided on appeal. In other words, there is really no duty to be right, only to ensure that one acts with integrity and diligence in exercising reasonable care and skill that is expected of him or her.

**[19]** In the instant case, I do not think there was any breach of duty on the part of the defendant. I think SD1 had quite appropriately and justifiably raised fairly persuasive arguments which any reasonable competent practitioner in his position would have done. It was unfortunate for him and the plaintiff in this case that the learned judge did not find in their favour. It was a matter, to my mind, which could have gone either way, as it sometimes happens in a court of law. It was a judgment call. As I had indicated earlier, positions taken by Judges may be revised on appeal. Even positions long considered to be correct and accepted may not be followed with the passage of time. An example which immediately springs to mind is the case of immunity of advocates in litigation which I had dealt with earlier. I am therefore more than satisfied that in this regard, there was no negligence on the part of the defendant.

**[20]** I now come to the second complaint of negligence. To recall, it was contended by the plaintiff that it was not explained to them the full effects of not appealing against the decision of the learned judge and to proceeding with the OS on the basis that the assertions of WMN were not rebutted because there was no affidavit in reply.

**[21]** In the regard, upon a careful perusal of the evidence, I find this contention to be quite a long way from the truth. After the learned judge had delivered his decision excluding the affidavit in reply, an opinion dated 10 November 2000 (exh. D8) by SD1 was provided to the plaintiff giving a detailed account of what transpired during the court proceedings and also the alternatives available, that is, either to proceed without the affidavit, or to appeal.

**[22]** Further to this, a meeting was also held on 21 November 2000 between the plaintiff's representatives and SD1, SD2 and SD3 again explaining the alternative courses of action. At this meeting, a decision was taken to proceed with the OS as an appeal will only delay the hearing of the OS. The plaintiff was already affected by the *interim* injunction that was granted against the plaintiff which prevented them from dealing with the lands.

**[23]** Considering these circumstances, I do not see how the defendant could be faulted in any way. In the result, I hold that the plaintiff had failed to prove there was any breach of duty either under contract or tort by the defendant. I would further hold that there was no negligence on the part of the defendant. The plaintiff's claim against the defendant is dismissed with costs.